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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1929.

Nos. 443 and 444.

MAURICE CAMPBELL, Federal Prohibition Administrator for the Southern Judicial District of New York, JAMES M. DORAN, Commissioner of Prohibition of the United States, and ANDREW W. MELLON, Secretary of the Treasury of the United States, *Petitioners*,

v.

GALENO CHEMICAL COMPANY, INC., UNION COURSE PHARMACY, INC., P. T. CHEMICAL COMPANY, INC., and ARTHUR S. KATZENBOGEN, doing business under the style and trade name of the CURATONE COMPANY.

MAURICE CAMPBELL, Federal Prohibition Administrator for the Second District, JAMES M. DORAN, Commissioner of Prohibition of the United States, and ANDREW W. MELLON, Secretary of the Treasury of the United States, *Petitioners*,

v.

D. P. PAUL AND COMPANY, INC.

RESPONDENTS' BRIEF.

CHARLES DICKERMAN WILLIAMS,
Counsel.

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RESPONDENTS' BRIEF.

There is unquestionably a conflict between the decision of the Court below in the case of *W. H. Long Co.,*

Inc., and the decision of the Circuit Court of Appeals for the Seventh Circuit in *Chicago Grain Products Co.* v. *Mellon*, 14 Fed. (2d) 362. We do not think that there is necessarily such conflict between the *Chicago Grain Products Co.* case, and the *Galeno* and *Paul* cases.

The decision of the Circuit Court of Appeals of the Second Circuit in *Higgins* v. *Foster*, 12 Fed. (2d) 646, and its decision in the *Long* case both held that denatured alcohol was not "liquor" within the meaning of the first sentence of the second paragraph of Section 6 of Title II of the National Prohibition Act:

> "All permits to manufacture, prescribe, sell or transport liquor may be issued for one year, and shall expire on the 31st day of December next succeeding the issuance thereof."

And in the *Higgins* and *Long* cases the Court therefore held that a permit to manufacture denatured alcohol did not come within the clause above quoted.

In the *Chicago Grain Products Co.* case the Court of Appeals of the Seventh Circuit held that denatured alcohol was "liquor" within the meaning of that clause, and therefore that a permit to manufacture denatured alcohol must expire upon the following December 31st.

The permits in the *Galeno* and *Paul* cases are permits to manufacture medicinal preparations required by and issued under Section 4, paragraphs (c) and (d), Title II, of the National Prohibition Act. By definition these medicinal preparations are *not* fit for beverage use. Paragraphs (c) and (d) of Section 4 define these products as follows:

> "(c) Patent and proprietary medicines that *are unfit for use for beverage purposes.*

"(d) Toilet, medicinal, and antiseptic preparations and solutions that *are unfit for use for beverage purposes.*" (Italics supplied.)

The brief for petitioners herein emphasizes that Section 1, Title II, of the National Prohibition Act restricts the meaning of "liquor" as used in the Act to substances "fit for use for beverage purposes" (Petitioners' Brief, pp. 14, 15).

Such being the statutes, it is submitted that it is clear that Congress did not intend "liquor" as used in the second paragraph of Section 6, Title II, of the National Prohibition Act above quoted to include medicinal preparations manufactured under Section 4, paragraphs (c) and (d).

The phrase italicized above—"unfit for use for beverage purposes"—does not appear in the paragraph of Section 4 relating to the manufacture of denatured alcohol, thereby leaving a basis for the *Chicago Grain Products Co.* decision.

The petitioners' brief points out that pure alcohol is not fit for use as a beverage in its original state but may be used for beverage purposes when treated. It is nowhere suggested in the Record or in the present brief of petitioners that any of the preparations manufactured by these respondents may be so treated as to be usable for beverage purposes. Even assuming that this could be shown (and we know nothing about it one way or another) we submit that it is far-fetched to say that because pure alcohol is considered "liquor" by the Act, therefore any substance that upon "treatment" may be fit for use for beverage purposes is "liquor" within the meaning of the Act. The simple addition of water is a very different thing from elaborate chemical processes. Under such a definition apples, molasses and wheat would be "liquor," and fresh fruit juices as well.

Petitioners also assert that the provision of Section 6, Title II, of the National Prohibition Act directing that every permit shall "limit the * * * time when" the authorized acts may be performed is not satisfied by provision in a permit that its duration shall be limited by good behavior, but must contain a calendar date of expiration.

This argument requires a new legal definition of the word "limit." It is used time and time again to denote periods of time other than calendar periods. For instance, a common expression in the law of future interests is to say that an estate is limited upon a life in being.

The Court below points out that as to those permits which Congress believed should expire upon a day certain, it so provided in Section 6.

There is in this case no suggestion that any of these respondents have ever been guilty of the slightest infraction of the law or of the very minute regulations which govern the commercial use of liquor. If any should be guilty of impropriety Section 9 of Title II authorizes the Commissioner to revoke the permit of such person. But a permit cannot be revoked by the simple fiat of the Commissioner, that is, cannot be revoked without observance of the restrictions of Section 9.

The Court will observe that two other plaintiffs in the bill in equity in the *Galeno* case were denied relief by the United States Circuit Court of Appeals for the Second Circuit. One such plaintiff, Daub, was issued a permit of the same class as that of Galeno at a time when the Regulations provided, as they did when the Galeno permit was issued, that such permits should be valid until revoked. The Administrator, totally without authority, and presumably by a clerical error, inserted an expiration date—De-

cember 31, 1924—in this permit. The expiration date was always ignored by the Treasury Department which treated the permit as valid until January, 1929. Under these circumstances it is believed that this unauthorized insertion of an expiration date was void (*Francis* v. *Francis*, 203 U. S. 233, 242).

If this is so, then Daub is equally entitled with Galeno to equitable relief.

In the case of *Lion Laboratories, Inc.*, the permit was issued at a time when this class ("H") of permits was of only annual duration. Thereafter, on September 1, 1926, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, issued a regulation giving such permits an indefinite duration.

The second paragraph of Section 6, Title II, of the National Prohibition Act reads, in part, as follows:

> "All permits to manufacture, prescribe, sell or transport liquor may be issued for one year and shall expire on the 31st day of December next succeeding the issuance thereof: *Provided*, That the Commissioner may without formal application or new bond extend any permit granted under this Act or laws now in force after August 31 in any year to December 31 of the succeeding year." (Italics as in original.)

The Circuit Court of Appeals construed this proviso as invalidating the regulation placing the Lion permit upon an indefinite basis. This ground of decision had not been urged by counsel and was not briefed. The Court, we submit, disregarded the rule of statutory construction that a grant should not be interpreted as a limitation, and that a proviso relates only to the enacting clause immediately prior thereto (*Cox* v. *Hart*, 260 U. S. 427, 435).

Of course if this Court disagrees with the doctrine pronounced in the *Higgins*, *Galeno* and *Paul* cases, the questions presented by the *Daub* and *Lion* cases do not arise; *contra*, if this Court agrees. Then they will be important in determining the extent of that doctrine.

These plaintiffs hope that this Court will also review their cases in the event that review is granted in the present cases. Counsel believed that there was little likelihood of the granting of review to these plaintiffs unless the present petition were granted, and therefore has delayed the printing and filing of a petition on their behalf until this petition is determined.

Respectfully submitted,

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New York.

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